IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs August 18, 2004

CHARLES RITTER v. STATE OF TENNESSEE

Appeal from the Criminal Court for Knox County
No. 46373 Ray L. Jenkins, Judge

No. E2003-03016-CCA-R3-PC - Filed October 14, 2004

The petitioner, Charles Ritter, appeals the post-conviction court's summary dismissal of his petition for post-conviction relief, arguing that the court erred in allowing the State to argue its motion to dismiss on the date scheduled for the evidentiary hearing, in dismissing the petition without a full evidentiary hearing, and in failing to issue either oral or written findings of fact and conclusions of law in support of its dismissal of the petition. Following our review, we conclude that the post-conviction court erred in summarily dismissing the petition based, apparently, on the lengthy passage of time between the filing of the original post-conviction petition in 1992 and the dismissal of the petition in 2003, and in failing to make appropriate findings of fact and conclusions of law. Accordingly, we reverse the dismissal of the petition and remand to the post-conviction court for an appropriate evidentiary hearing.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Reversed and Remanded

ALAN E. GLENN, J., delivered the opinion of the court, in which DAVID G. HAYES and JAMES CURWOOD WITT, JR., JJ., joined.

Brandt Davis, Knoxville, Tennessee, for the appellant, Charles Ritter.

Paul G. Summers, Attorney General and Reporter; Seth P. Kestner, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Philip H. Morton, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

In 1989, the petitioner, Charles Ritter, was convicted by a Knox County Criminal Court jury of aggravated rape and aggravated sexual battery, for which he received an effective sentence of forty years as a Range II offender. His convictions were subsequently affirmed by this court, and his

application for permission to appeal to the supreme court was denied. See State v. Charles Ritter, No. 1279, 1990 WL 12448, at *1 (Tenn. Crim. App. Feb. 16, 1990), perm. to appeal denied (Tenn. May 14, 1990).

Our review of the post-conviction proceedings in this case is hampered by the sparse record on appeal, which consists of a brief transcript from a November 20, 2003, hearing, and a few pleadings and court minutes contained in the technical record. From what we have been able to glean from this sparse source, the petitioner apparently filed his original petition for post-conviction relief on January 27, 1992, alleging, among other things, prosecutorial misconduct, error on the part of the trial court in its determination that the child victim was a competent witness, and ineffective assistance of counsel. On November 22, 1999, the post-conviction court allowed original post-conviction counsel to withdraw and the petitioner to substitute a second post-conviction counsel. According to the court minutes contained in the technical record, on October 30, 2003, the post-conviction court allowed the petitioner to substitute yet a third post-conviction counsel. On that same day, the court also apparently denied the State's motion to dismiss for failure to prosecute,[1] and reset the case for a November 13, 2003, evidentiary hearing.

On November 12, 2003, the petitioner filed an amended petition for post-conviction relief, incorporating his original petition and setting forth more specific grounds in support of his ineffective assistance of counsel claim. The technical record also contains the State's "Motion to Dismiss," stamped by the court clerk as filed on November 12, 2003, alleging that the case had been set and reset sixty-seven times, that the resettings had "been occasioned by the Petitioner and not the State," and that the petitioner had changed attorneys twice, with the most recent substitution in October 2003, in an effort to avoid the hearing scheduled on that date. Citing Williams v. State, 831 S.W.2d 281 (Tenn. 1992), the State asserted that the petitioner's actions in delaying the evidentiary hearing constituted bad faith and an abuse of the post-conviction process and requested that the post-conviction court therefore dismiss the case with prejudice.

The next action reflected in the record is a short hearing held on November 20, 2003, at which the State and post-conviction counsel briefly argued the State's motion to dismiss, neither side presenting any proof. At its conclusion, the post-conviction court granted the motion and dismissed the petition with prejudice. However, it made neither oral nor written findings of fact or conclusions of law to explain its decision to grant the State's motion. Subsequently, the court denied the petitioner's motion to rehear, and this appeal followed.

ANALYSIS

The petitioner raises the following three issues on appeal: (1) whether the post-conviction court erred in allowing the State to "orally continue argument on its oral motion to dismiss, which had been denied by the court on October 30, 2003"; (2) whether the post-conviction court erred in

[1] This motion is not included in the record.

dismissing the petition with prejudice without a full evidentiary hearing; and (3) whether the post-conviction court erred in failing to issue written or oral findings of fact and conclusions of law.

The petitioner first contends that the post-conviction court erred in allowing the State to renew its argument for the dismissal of the petition at the November 20, 2003, date scheduled for the evidentiary hearing, without first filing a motion to have the court reconsider its earlier oral denial of the motion to dismiss. He asserts that "[t]he State filed no motions or other pleadings requesting the court to reconsider the denial of this motion to dismiss, which was verbally entered by the trial court on October 30, 2003." However, as the State points out and we have previously noted, the record reflects that the State filed a written motion to dismiss on the same date the petitioner filed his amended petition for post-conviction relief, with a certificate of service indicating that a copy had been delivered to post-conviction counsel's office "by mailing or hand-delivery, on this the 12th day of November, 2003." Thus, regardless of how the State styled the document, the record indicates that the petitioner was given notice of the State's renewal of its motion to dismiss. We cannot, therefore, conclude that the post-conviction court's consideration of the motion at the November 20, 2003, hearing was, in itself, error.

We agree, however, that it was error for the court to dismiss the petition without an evidentiary hearing and without making any findings of fact or conclusions of law. In the Williams case cited by the State, our supreme court, addressing the effect of a petitioner's voluntary withdrawal of a petition for post-conviction relief, concluded that the post-conviction court's resulting dismissal of the petition with prejudice for failure to prosecute would be proper when the court "discerns that a litigant is abusing the post-conviction process by filing successive petitions and seeking repeated withdrawals, or is otherwise acting in bad faith," but would constitute an abuse of discretion when "it appears that the petitioner is not acting in bad faith but has some reasonable basis for seeking voluntary withdrawal." 831 S.W.2d at 283.

The transcript of the November 20 hearing, which consists of only a few pages, reflects the following:

> [ASSISTANT DISTRICT ATTORNEY]: [W]e suggest that this record reflects bad faith in that this matter has been set 67 times and reset at the instance of the Petitioner almost each and every time, and that he has - - and as I would note as well, he's changed lawyers now two or three times in an attempt to avoid a hearing on this matter.
>
> We ask that it be dismissed.
>
> THE COURT: Yes, sir.
>
> [POST-CONVICTION COUNSEL]: Your Honor, I don't think there's been any attempt by [the petitioner] to avoid a hearing.

I've read the Williams case. The Williams case . . . deals with a petitioner withdrawing a petition. It doesn't address the issue of continuances. It does make reference to bad faith. And if there's any bad faith, and all the continuances have been granted in this case, I'd say it's not with the Petitioner. I think it's something we need to address and maybe hear from counsel who represented him throughout the years.

. . . .

And I believe if the General is going to insist on having this motion heard, I need to put something on the record through the two attorneys that handled this case.

And I would note that in looking at the record, there's never been an objection by the State in any of these resettings. And for whatever reason, you know - - it hasn't [sic] passed through five or six assistant prosecutors - - it was always reset.

. . . .

THE COURT: At best, any testimony would be stale.

[POST-CONVICTION COUNSEL]: So, Judge, I suppose I would like to delay this in order to get both [previous post-conviction counsel] in court.

[ASSISTANT DISTRICT ATTORNEY]: Your Honor, we delayed it twice already, and I thought we were going to be heard on it today and let the Court decide it. I mean, that's why it's set today.

[POST-CONVICTION COUNSEL]: I did, too, Judge. [First Post-conviction counsel] is under subpoena, and [second post-conviction counsel] isn't, although he still hasn't been relieved as counsel. But I talked to him last night, and he is with his – I think he has triplets at the doctor's office this morning. He said he would be here – or could be here maybe 10:30 or 11. But [first post-conviction counsel] is still out in Clinton.

[ASSISTANT DISTRICT ATTORNEY]: Judge, let me make one other observation on the bad-faith issue.

> This petition was filed I think in 1991. And now that [post-conviction counsel], his third lawyer, has gotten involved in it, he now seeks to amend that petition for the first time in 12 years.
>
> So this Petitioner is shopping around until he can find a lawyer that – that'll say what he wants to say, apparently. That's just what the record reflects. And that, combined with the 67 times it's been set, we say is bad faith.
>
> THE COURT: All right. I'll grant the State's motion to dismiss with prejudice.

The post-conviction court's finding of bad faith on the part of the petitioner can be inferred from the exchange above and by its dismissal of the petition with prejudice. Although presumably documentary evidence was available and was the basis for the State's claim that the matter had been reset sixty-seven times, "almost each and every time" at the request of the petitioner, the record on appeal contains no proof of this assertion. In fact, as to the history of this matter, the record shows only that approximately eleven years had passed between the filing of the original petition for post-conviction relief and the State's seeking its dismissal. While the State made the same claims, presumably recounted from court records, in the motion to dismiss and during oral argument as to the number of times the matter had been reset and the party seeking the continuances, none of those records were supplied to this court. The State's claims before the post-conviction court are insufficient to establish facts; for, as this court explained in State v. Roberts, 755 S.W.2d 833, 836 (Tenn. Crim. App. 1988), "the arguments of counsel and the recitation of facts contained in a brief, or a similar pleading, are not evidence." Thus, we have no proof before us as to how many times the matter had been reset or which party had sought the reschedulings. Further, Tennessee Code Annotated section 40-30-106(f) (2003) requires that, when a petition for post-conviction relief is dismissed without a hearing, "[t]he order of dismissal shall set forth the court's conclusions of law." Here, the record is silent as to the reason for the dismissal. Accordingly, we concur with the defendant that the order of dismissal must be reversed and the matter remanded.

CONCLUSION

We reverse the judgment of the post-conviction court and remand for an evidentiary hearing to determine the reason for the delay in the prosecution of the case. Should the post-conviction court find based on the proof that the delay was caused by the petitioner's bad faith, it may appropriately dismiss the petition for failure to prosecute. However, should it find that the petitioner was either not responsible for the delay or had a reasonable reason for seeking the continuances, the petitioner should be granted an evidentiary hearing on the merits of his petition.

ALAN E. GLENN, JUDGE